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No. 99-696

In the Supreme Court of the United States

AMERICAN GRAIN TRIMMERS, INC.
AND FRANK GATES-ACCLAIM, PETITIONERS

v.

OFFICE OF WORKERS' COMPENSATION PROGRAMS
AND MARIAN JANICH

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, on the facts of this case, petitioners rebutted the presumption of coverage established by Section 20(a) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 920(a).

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OPINIONS BELOW

The opinion of the court of appeals sitting en banc (Pet. App. 1-22) is reported at 181 F.3d 810. The decision and order of the Benefits Review Board (Pet. App. 23-32), the decision and order of the administrative law judge (ALJ) on reconsideration (Pet. App. 33-40), and the ALJ's original decision and order (Pet. App. 41-61) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 21, 1999. On September 13, 1999, Justice Stevens extended the time for filing a petition for a writ of

certiorari to October 19, 1999, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves a claim for benefits filed by Marian Janich (the claimant), widow of Paul Janich, under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* (LHWCA or Longshore Act). Pet. App. 4. For all but the first two of his 40 years of employment with petitioner American Grain Trimmers, Inc. (petitioner), Paul Janich worked as a foreman supervising the loading of grain onto barges on the Great Lakes. *Id.* at 2. During the 38 days before his death, Janich worked between 29 and 33 days. On August 12, 1992, Janich began work at 8 a.m. After loading one barge and then breaking for lunch, Janich's crew began to load a second barge. Janich initially monitored that process, as he often did, by radio from his nearby office. When it began to rain heavily, however, a federal grain inspector instructed Janich to suspend the loading operation, to prevent the grain from getting wet. Janich then left the office and walked out to the dock, where he told his crew to stop loading and leave the dock. While supervising that process Janich collapsed and died from a sudden cardiac arrest. *Id.* at 2-3, 24.

Janich had suffered from serious heart and other medical problems for some years before his death. Pet. App. 3-4, 50-51. He returned to work on July 6, 1992, for the first time after having been hospitalized in November 1991, and he died at work a little over a month later. *Id.* at 2, 4. His widow filed a claim for death benefits under the LHWCA. Petitioner opposed the claim.

2. In March 1996, an administrative law judge (ALJ) granted Mrs. Janich's claim. Pet. App. 60-61. The ALJ first found that the claimant had successfully invoked the presumption established by Section 20(a) of the LHWCA, 33 U.S.C. 920(a), which provides that "in the absence of substantial evidence to the contrary," a claim is presumed to come within the provisions of the Act. Pet. App. 55. Relying on the fact that Janich died at work from a cardiac arrest and on the deposition testimony of his treating physician, Dr. Castor, that either physical exertion or emotional stress could have precipitated the arrest, the ALJ concluded that the claimant had made out a prima facie case of entitlement, under Section 20(a), by establishing that "working conditions existed which could have caused Decedent's heart attack." *Id.* at 56.

The ALJ then held that petitioner had not succeeded in rebutting the claimant's prima facie case. Pet. App. 57. Although he found petitioner's expert Dr. Carroll, a Board-certified cardiologist and internist who had reviewed Janich's records, to be a credible witness, the ALJ concluded that Carroll's testimony concerning the lack of any causal relationship between Janich's job and his death was too speculative to constitute "substantial evidence" of lack of causation. *Ibid.* The ALJ relied (*ibid.*) on Dr. Carroll's statement (*id.* at 64) that in the absence of an autopsy, the exact cause of Janich's death (whether, for example, the cardiac arrest was caused by an arrhythmia or by another heart problem) was "speculative at best," and on his testimony (see *id.* at 55) that he did not know if Janich's work history over the 38 days before his death could have been a precipitating factor in his death. The ALJ further noted that Dr. Carroll's opinion that Janich's death was "most likely" caused by a ventricular arrhythmia was based

largely on (i) general mortality figures for individuals with overall heart conditions similar to Janich's and (ii) Dr. Carroll's observation that in such circumstances death is "often" caused by an arrhythmia. *Id.* at 55, 57.

Having concluded that the claimant's evidence indicated that working conditions could have caused Janich's death, and that petitioner had failed to present "substantial evidence to the contrary," the ALJ awarded death benefits on the basis of the statutory presumption in Section 20(a). Pet. App. 57-58. Based on Janich's preexisting heart condition and diabetes, however, the ALJ granted petitioner relief under Section 8(f) of the Act, 33 U.S.C. 908(f), thereby limiting petitioner's liability to 104 weeks of benefits, and shifting the remaining liability to a special fund established for that purpose. Pet. App. 58-59; see *id.* at 6.

On cross-petitions for reconsideration, the ALJ agreed with claimant that an upward adjustment of the calculation of Janich's average weekly wage to reflect the national average was necessary, but rejected petitioner's contention that Dr. Carroll's opinion was sufficient, as a matter of law, to rebut the presumption of causation. Pet. App. 35-40. More specifically, the ALJ disagreed with petitioner's contention that, under the reasoning of this Court's decision in *Director, OWCP* v. *Greenwich Collieries*, 512 U.S. 267 (1994), the Section 20(a) presumption is rebutted by the production of any contrary evidence. Pet. App. 37.

The ALJ also rejected petitioner's contentions that it was required to produce only a "minimum quantum" of evidence to rebut the presumption, and that the fact-finder was not entitled to assess the weight or credibility of that evidence. Pet. App. 37-38. Noting that "the Section 20(a) presumption is a *statutory* presumption which by its express terms requires the production of

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substantial evidence in order to rebut it," the ALJ pointed out that the Department of Labor's Benefits Review Board (BRB or Board) has consistently required that such evidence be "specific and comprehensive"—a standard that requires some assessment of weight and credibility. *Id.* at 38 & n.3. The ALJ also relied on a recent Board decision that he read to hold "that Section 20(a), once invoked, shifts the burden of *proof* to [the] employer on the issue of causation," and he noted that the Board, in that case, had rejected a physician's opinion as too speculative and equivocal to rebut the presumption. *Id.* at 38-39 (citing *Kubin* v. *Pro-Football, Inc.*, 29 Ben. Rev. Bd. Serv. 117 (1995)). The ALJ reiterated his conclusions that Dr. Carroll's opinion concerning the precise cause of Janich's death and its relation to his job was speculative, while Dr. Castor's opinion established that death "could have been related to [Janich's] working conditions." *Id.* at 39. Accordingly, he reaffirmed his determination that petitioner's evidence "fail[ed] to rebut the presumption that [Janich's] death was causally related to his employment." *Ibid.*

3. The Benefits Review Board affirmed. Pet. App. 23-32. The Board first concluded that the ALJ's finding that the claimant had established a *prima facie* case was supported by substantial evidence, including the medical opinion of Dr. Castor. *Id.* at 26- 27. Because the claimant had succeeded in invoking the Section 20(a) presumption, the Board held that the burden had shifted to the employer "to present specific and comprehensive evidence sufficient to sever the causal connection between the injury and the employment." *Id.* at 27. In that regard, the Board held that nothing in the *Greenwich Collieries* decision addressed or undercut the Board's longstanding requirement that rebuttal

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evidence must be "specific and comprehensive." *Id.* at 28. Moreover, the Board noted that "[w]here aggravation of a pre-existing condition is at issue, [the] employer must establish that work events neither directly caused the injury or death nor aggravated the pre-existing condition resulting in injury or death." *Ibid.* Finally, the Board pointed out that if the employer succeeds in rebutting the Section 20(a) presumption, the ALJ must then weigh all of the evidence and resolve the issue of causation on the basis of the entire record. *Ibid.*

Applying those principles, the Board affirmed the ALJ's determination that petitioner had failed to rebut the Section 20(a) presumption. Pet. App. 28. Noting the ALJ's reliance on Dr. Carroll's testimony that the exact cause of death was speculative, that he could not rule out the cumulative effect of Janich's final month of work as a cause of death, and that he did not know the exact activities performed by Janich on his final day or how physically strenuous his job was, the Board sustained the ALJ's conclusion that "Dr. Carroll's opinion did not unequivocally rule out a connection between decedent's employment and his death." *Id.* at 28-30. The Board further observed that the record did not contain any other medical opinion that was sufficient to rebut the presumption of causation, and it accordingly affirmed the award of benefits. *Id.* at 30-31.

4. The court of appeals affirmed, having first decided, *sua sponte*, to hear the case en banc. Pet. App. 1-22; see Pet. 6. The court first summarily rejected petitioner's contentions that there was insufficient evidence in the record to invoke the Section 20(a) presumption, and that in any event petitioner was entitled, on the whole record, to judgment as a matter of law. Pet. App. 8. The court then considered what, as a legal matter, an

employer must do to rebut the Section 20(a) presumption (*id.* at 8-13), and whether the ALJ and the BRB should have held that petitioner had rebutted the presumption in this case (*id.* at 13-16).

On the first issue, the court addressed "two fundamental questions: first, what kind of burden shifts to the employer, a burden of production or a burden of persuasion; and second, what quantity or quality of evidence is enough to satisfy that burden, whether it relates to production or persuasion." Pet. App. 9. Relying on *Del Vecchio* v. *Bowers*, 296 U.S. 280 (1935), and *Greenwich Collieries*, the court concluded that in Longshore Act cases, as in employment discrimination cases, only the burden of production shifts to the employer. Pet. App. 9-11; compare *St. Mary's Honor Center* v. *Hicks*, 509 U.S. 502 (1993). As to what evidence will satisfy that burden, the court observed that Section 20(a) on its face requires the employer to produce "substantial evidence." Pet. App. 11. Relying on *Steadman* v. *SEC*, 450 U.S. 91, 98 (1981), the court explained that "[t]he word 'substantial' denotes quantity," while the Administrative Procedure Act's requirements that evidence be relevant, reliable, and probative "add[] a qualitative dimension * * * as well." Pet. App. 12. Adopting a summary phrase "well known to the law," the court concluded that in order to rebut the Section 20(a) presumption, an employer must introduce "such relevant evidence as a reasonable mind might accept as adequate to support [the] conclusion" that the employee's injury or death was unrelated to his or her employment. *Id.* at 12-13 (quoting *Richardson* v. *Perales*, 402 U.S. 389, 401 (1971)).

Turning to the facts of this case, the court first noted that it saw no inconsistency between the standard it had articulated and the ALJ's statement that the

employer must produce "specific and comprehensi[ve] evidence, not speculation." Pet. App. 13; see *id.* at 56. The court explained that a requirement of specificity in rebuttal does not shift the burden of persuasion, any more than does a court's refusal to accept a vague or speculative affidavit as sufficient to defeat a motion for summary judgment. *Id.* at 13. The court then agreed with the ALJ (and the BRB) that "Dr. Carroll's testimony was so hedged and speculative that it did not, even taking it at face value, undercut Mrs. Janich's *prima facie* case," and that "[a] decision based solely on Dr. Carroll's statements would not have had the support of substantial evidence in the record." *Id.* at 14. Hence, "the ALJ was entitled to find that [petitioner] did not introduce substantial evidence to rebut the § 20(a) presumption of coverage." *Ibid.*

The court acknowledged that ambiguities in the ALJ's opinion on reconsideration raised "the possibility that the ALJ might have wrongly thought that the burden of persuasion," rather than merely a burden of production, "shifted to the employer." Pet. App. 14-15. The court pointed out, however, that the ALJ's original decision, which included his central finding concerning the employer's failure to rebut, correctly articulated the applicable legal standards. *Id.* at 15. The court concluded that any analytical error that might be reflected in the opinion on reconsideration was harmless, because the ALJ "had the right standard in mind when he assessed the employer's evidence in the original opinion," and because the BRB applied the correct standard when it reviewed and upheld the ALJ's decision. *Id.* at 15-16. The court accordingly affirmed the award of survivor's benefits to Mrs. Janich. *Id.* at 16.

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Chief Judge Posner (joined by Judges Coffey, Easterbrook, and Manion) agreed that invoking the Section 20(a) presumption shifts only a burden of production to the employer, leaving the burden of persuasion on the claimant, but he dissented from the majority's application of that analysis to the facts of this case. Pet. App. 16-19. Reviewing Dr. Carroll's testimony, Chief Judge Posner concluded that it constituted specific, credible, expert opinion evidence that "Janich's death was completely unrelated to his employment" (*id.* at 17), and that it was sufficiently "substantial" to satisfy the employer's burden of production. He would accordingly have remanded the case to the BRB for reconsideration in light of all the evidence, without reliance on the Section 20(a) presumption. *Id.* at 19.

Judge Flaum (also joined by Judge Manion) similarly "agree[d] with the Majority's well reasoned analysis of the 20(a) presumption" (Pet. App. 20), but dissented from the application of that analysis in this case. *Id.* at 20-22. In Judge Flaum's view, Dr. Carroll's expert opinion amounted to "substantial evidence" that Janich's work "played no role in his death." *Id.* at 21-22. Thus, "[h]ad the Majority's approach actually been followed, the ALJ would have eliminated the presumption and analyzed the case on the record as a whole." *Id.* at 21. Judge Flaum emphasized that, after such an analysis, the ALJ "[might] well have concluded that Mrs. Janich proved by a preponderance of the evidence that Mr. Janich's work was the most likely cause of his death." *Id.* at 22. Because, however, he "[could not] be sure what role the improperly retained presumption played in the decision" to award benefits, Judge Flaum would also have remanded the case "for reconsideration consistent with the clear approach the Majority outlines today." *Ibid.*

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ARGUMENT

1. Section 20(a) of the Longshore Act, 33 U.S.C. 920(a), provides that in the adjudication of any claim for benefits under the Act, "it shall be presumed, in the absence of substantial evidence to the contrary * * * [t]hat the claim comes within the provisions of" the Act.[1] Once the presumption of coverage under Section 20(a) is invoked, it controls the result unless the employer presents testimony or other evidence "sufficient to justify a finding" that the incident was not work-related, in which case "the presumption falls out of the case" and the matter is resolved by the factfinder on the basis of all the evidence, with the claimant bearing the ultimate burden of persuasion. See *Del Vecchio* v. *Bowens*, 296 U.S. 280, 286 (1935) (addressing related presumption under Section 20(d)); *U.S. Indus./Fed. Sheet Metal, Inc.* v. *Director, OWCP*, 455 U.S. 608, 612 n.5 (1982) (presumption under Section 20(a) is of same nature as that under Section 20(d)).

The court of appeals properly articulated this legal framework for determining whether the Section 20(a) presumption has been rebutted, with all 11 judges endorsing that portion of the court's opinion. Pet. App. 8-13, 16, 20. The court then analyzed the record in this case and sustained the conclusion of the ALJ and the Benefits Review Board that petitioner did not rebut the presumption of coverage because the testimony of its expert witness was "so hedged and speculative" that it could not, even if fully credited, have supported a decision in petitioner's favor on the ultimate issue of

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[1] Section 20 also establishes presumptions that notice of the claim is sufficient and that the employee's injury or death was not due to his intoxication or to his intention to injure or kill himself or another person. 33 U.S.C. 920(b)-(d).

work-relatedness, and thus did not amount to "substantial evidence" within the meaning of Section 20(a). *Id.* at 14; see *id.* at 13-16. The dissenting opinions differ from the court's opinion only in their evaluation of the strength of petitioner's evidence and their consequent conclusion that this case should be remanded to the BRB for further consideration in light of the court's clear articulation of the applicable legal rules. See *id.* at 16-22. That fact-bound issue does not warrant review by this Court.

2. There is no merit in petitioner's contention (Pet. 9, 13, 15-16) that the decision below conflicts with *Bath Iron Works Corp.* v. *Director, OWCP*, 137 F.3d 673 (1st Cir. 1998). The court in *Bath Iron Works* articulated exactly the same test as the court in this case:

> As we have previously held, the presumption is overcome with substantial evidence of non-causation. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

137 F.3d at 675 (citations omitted); compare Pet. App. 12-13. The court then reversed the BRB and sustained the ALJ's conclusion, "backed by an extensive discussion of the several experts," that the employer's evidence concerning the likely cause of the claimant's lung cancer was sufficiently "substantial" to rebut the Section 20 presumption and support the ALJ's ultimate finding in favor of the employer. 137 F.3d at 675-676. As in this case, the court's opinion was rendered over a dissent that did not question the majority's definition of "substantial evidence," but interpreted the record differently and would have reached the opposite result under that test. *Id.* at 676-677 (Lynch, J., dissenting). Any apparent differences in the outcomes of the two

cases are accordingly attributable, not to disagreement between the courts on any principle of law, but to the inevitable variations that arise in the application of a legal test to particular facts.

Petitioner attempts to portray these variations as legal conflicts by maintaining, for example, that the court below could have reached its conclusion in this case only by according "deference" to the findings of the ALJ. Pet. 8. The court did not "defer" to the ALJ, however, but rather "agree[d]" with him, based on its own review of the evidence, that "[a] decision based solely on Dr. Carroll's statements would not have had the support of substantial evidence in the record." Pet. App. 14. Similarly, there is no inconsistency between the decision in this case and *Bath Iron Works*' point (137 F.3d at 675) that an expert opinion may constitute "substantial evidence" even though it speaks only in terms of "reasonable probabilities." The court below did not reject reliance on Dr. Carroll's opinion because it was rendered only to "a reasonable degree of medical certainty" (Pet. 8), but rather because the court shared the view of the ALJ and the BRB that the opinion was unduly "hedged and speculative" as to the exact cause of Janich's death, a point which was critical to the doctor's further opinion concerning whether Janich's death was in any way related to his work. Pet. App. 14.

Nor is there weight to petitioner's claims that the decision below "requires [that] the evidence presented * * * to rebut the presumption be sufficient to persuade the ALJ on the ultimate issue" (Pet. 10) or "transforms the burden in rebutting the presumption into the functional equivalent of refuting the claim by a preponderance of the evidence" (Pet. 15). Apart from stating as plainly as is possible that "the burden of persuasion rests at all times on the claimant" (Pet. App.

10-11), the court of appeals made clear that the employer need only produce evidence that, if believed by the trier of fact and considered in isolation (rather than weighed against the claimant's evidence), would be sufficient to support a finding that the employee's injury or death was not related to his employment. See *id.* at 12-14.[2] At bottom, petitioner's contention, like that of the dissenters below (and the dissenter in *Bath Iron Works*), is only that the court misapplied the proper legal test. That contention does not merit further review.

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[2] Similarly, whatever the merit of petitioner's argument (Pet. 10-11, 13-15) that credibility should play no role in determining whether the presumption has been rebutted, this case presents no such issue. As the BRB noted (Pet. App. 28), the ALJ specifically found Dr. Carroll to be "credible" (*id.* at 57), and the court of appeals did not question that assessment. The court instead upheld the ALJ's determination that "Carroll's testimony was so hedged and speculative that it did not, *even taking it at face value*, undercut Mrs. Janich's *prima facie* case." *Id.* at 14 (emphasis added).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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